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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 633-634

CLIFTON B. LAYTON,

Petitioner,

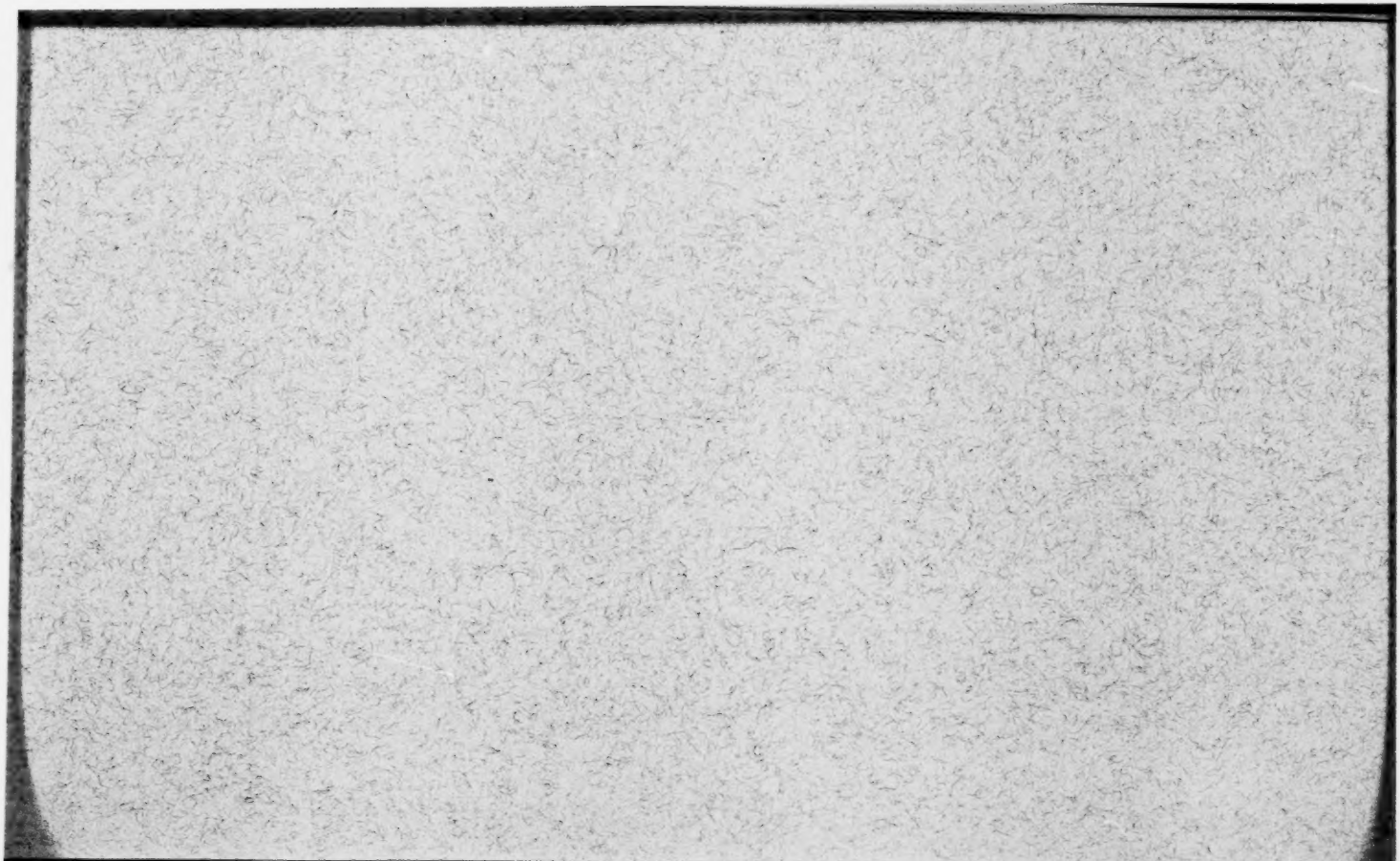
vs.

WILLIAM J. THAYNE

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELMER McCLAIN, Lima, Ohio,

J. D. SKEEN,
E. J. SKEEN,
Counsel for Petitioner.



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This bankruptcy matter has long been before the courts. *Layton* v. *Thayne*, 116 F. 2d 796, 133 F. 2d 287, (Record herein 69).

The order which petitioner seeks to reach in this proceeding takes the case back to the state court for a new start, on the question of "the final determination of the debtor's right of redemption of a farm from mortgage foreclosure." (R. 24.)

Authority for issuing a writ upon this petition is given by Section 240 of the Judicial Code. 28 U. S. C. A., 347.

Statement of Matter Involved

The petitioner filed a petition with schedules praying for relief under Section 75 of the Bankruptcy Act on December 11, 1941. The schedule showed the ownership of a farm subject to a judgment on foreclosure in favor of the Davis County Bank for $7994.00. Being unable to make settlement with his creditors, he filed an amended petition under Subsection (s), was adjudicated and the matter referred to a conciliation commissioner. (R. 4 to 8.)

William J. Thayne filed a petition for an order striking the farm land from the schedules. A hearing was had. The court found that Thayne had foreclosed a second mortgage upon the property and had taken a deed; that subsequently the first mortgage was foreclosed, Thayne being a party defendant, a deficiency judgment was taken against the petitioner, and that this gave to the petitioner a right of redemption in the property which had not been extinguished, but that right of redemption did not give him such status as would sustain a proceeding under Section 75 of the Bankruptcy Act, and further that the debtor was not a farmer. An appeal was taken to the Circuit Court of Appeals by the debtor, and the judgment of the District Court was reversed. (133 F. 2d 287.)

On June 7, 1943, the District Court issued an order directing creditors to appear before the court and show cause why the court should not make an order

> "* * * fixing and determining the time within which the above named debtor may redeem the property scheduled herein, the amount to be paid for such redemption, the person to whom and the manner in which such redemption money shall be paid, and further designating the person entitled to the possession of the property so scheduled and the terms upon which such possession shall be retained * * *" (R. 18.)

On August 18, 1943, the debtor filed a petition reciting that he was offered $14,000.00 for the property, a deposit of $1,000.00 having been made and praying that the property be sold. On August 28th, he filed a petition for the appointment of a trustee to sell the property. The court dismissed both petitions for the reason that

> "* * * the right of redemption of the said debtor is not such a right as can be administered by the sale of the said property, and the court is without authority of law to sell said property, directly or through the medium of a trustee, and the court concludes that the said petitions, and each of them, should be denied and dismissed." (R. 21.)

and on the same day made an order extending the period of redemption to and including the 16th day of October, 1943, within which to redeem or tender redemption to the proper state officials from the sale or sales had in the Second Judicial District Court in and for Davis County, State of Utah, of the property described in the schedules of the debtor filed herein, and ordering that,

> "The State Courts are authorized to exercise jurisdiction for the purpose of determining the redemption rights of redemptioners, but not as to the time as to when redemption may be made, which under the bankruptcy law, this Court reserves." (R. 22.)

On the 16th day of October, the debtor filed his report and petition reciting that he tendered to the Sheriff of Davis County and to the Davis County Bank, the full amount for which the property was sold together with interest and costs; that neither the sheriff nor the bank would accept the tender or make any statement of the amount claimed. The debtor offered to keep the tender good. On the same day, the District Court made an order,

> "* * * that the time of redemption, as provided under the provisions of Section 75 of the Bankruptcy

> Act, be extended until the final determination of the debtor's right of redemption is made by the state court of competent jurisdiction and until final decision of the Supreme Court of Utah and the Supreme Court of the United States and in case no appeal or appeals are taken, then until thirty days after the trial courts judgment has become final * * * provided that appropriate proceedings be instituted for the determination of said rights within thirty days of the date hereof." (R. 24.)

An appeal was taken from the orders of September 21st and October 16th to the Circuit Court of Appeals for the Tenth Circuit and the judgments were affirmed (R. 73).

The appeal from these orders is No. 2889 in the transcript of record. Thereafter, the petitioner filed his petition in the District Court describing the land and reciting in detail the tender he made to the Sheriff and the Davis County Bank of the amount of the judgment, costs and interest which he computed to be $8300.00; that thereafter the attorney for the bank stated that the demands of the bank were $8964.17, and the debtor tendered an additional amount aggregating in all $8964.17; that the bank refused to accept the amount or to make any statement whatsoever. The prayer was that the bank be required to set forth fully the sum bid for the property, rentals and profits, interests and costs, etc., and upon payment of the amount due, that the court order and decree that the property be delivered to the debtor free and clear of encumbrances.

An answer was filed setting out the account of William J. Thayne. It was stipulated that a tender of the money had been made to the Davis County Bank. The court declined to hear questions involving the amount of the claim or to permit of any redemption of the property (R. 53). An appeal was taken from the order and was given the number in the Circuit Court of Appeals of 2892. The two appeals were consolidated, and this petition is for a writ

to the United States Circuit Court of Appeals upon the consolidated cases.

It is contended that the orders of the District Court and the opinion and judgments of the Circuit Court of Appeals are in conflict with

Meredith v. *City of Winter Haven*, 320 U. S. 228, 88 L. Ed. 1;

Wragg v. *Federal Land Bank of New Orleans*, 317 U. S. 325, 87 L. Ed. 300;

Wright v. *Logan*, 315 U. S. 139, 86 L. Ed. 745;

John Hancock Mutual Life Insurance Co., v. *Bartells*, 308 U. S. 180, 84 L. Ed. 176;

Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370;

Borchard v. *California Bank*, 310 U. S. 311, 84 L. Ed. 1222.

and that it is likewise in contravention of Section 75 (n) and is tantamount to an abrogation of Subsection (s) of said Act.

It is further contended that the District Court and the Circuit Court of Appeals have so far departed from the procedure specifically prescribed by the statute as construed in the cases above cited as to call for the exercise of this Court's power of supervision over the bankruptcy proceedings.

From the statement heretofore made and from an examination of the record and file, it will be found that while the Circuit Court of Appeals in the first appeal followed the decision of this Court in the *Wragg* case to the extent of holding that there was a right of redemption in the petitioner but without statutory or other authority, it limited the right to the extent that no one could know what the petitioner could or could not do by way of redemption.

In the decision which we now seek to review, it has approved the order of the District Court sending the petitioner to the state court for a judgment determining his

right of redemption. This denies the petitioner the fruits of the litigation and starts anew litigation which the Circuit Court of Appeals condemns as already having run too long. The petitioner has been denied the right under a federal statute to follow procedure which is authorized and approved by the statutes and by the decisions of this Court. There is brought to this court for determination the following questions:

1. May the district court in bankruptcy refuse to fix the amount, after hearing, that a debtor is required to pay for the redemption of his property under the statute?

2. May the district court refer to the state court the question of the right of the debtor to redeem when under the decision of the Circuit Court of Appeals in the first appeal he was held to have such right?

3. May the District Court refer to the state court in any case the determination of a right of redemption where the jurisdiction of the District Court over the debtor and his property exist by virtue of a pending proceeding under Section 75 (s)?

The decision of the Circuit Court of Appeals, at this writing, has not been published, but it is found in the transcript of record filed herein, page 69.

WHEREFORE, petitioner prays that Writs of Certiorari be issued by this Court directing that all the proceedings in the Circuit Court of Appeals for the Tenth Circuit be certified and that the judgment of the Circuit Court of Appeals and the District Court of the United States for the District of Utah be reversed and that petitioner be granted all of the rights provided by Section 75 of the Bankruptcy Act.

J. D. SKEEN,

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Attorneys for Petitioner.